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Sale of Cooperative Stock Held Subject to Real Property Statute of Frauds

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of the recall letters outweighs any possible prejudice" which might be occasioned by their receipt in evidence.[256] Because the trial court had not attempted to dispell this prejudice via careful jury instructions, however, the cause was remanded for a retrial.[257]

It is submitted that the result reached in *Barry* is both desirable and just. The postoccurrence repair doctrine recently has been sharply attacked by a commentator who maintained that it deprives many deserving litigants of relevant and often crucial evidence.[258] Courts of some jurisdictions, perhaps in recognition of this severe effect of the rule, have refused to apply it in products liability actions.[259] Beyond its adverse impact on the truth-seeking process, the doctrine's principal justification may be unfounded; no empirical data exists to substantiate the claim that admission of subsequent repair evidence would discourage reparative measures.[260] By refusing to extend the rule, the *Barry* court has ensured that a jury in a products liability action will not be unreasonably "deprived of a complete picture" of the case's factual setting.[261] Hopefully, *Barry* is the first step towards the elimination of the harsh subsequent repairs doctrine from New York's law of evidence.[262]

Sale of cooperative stock held subject to real property statute of frauds.

An individual purchasing shares of stock in a cooperative housing corporation receives a proprietary lease entitling him to occupy an apartment in a housing complex.[263] The combination of stock and

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[256] 55 App. Div. 2d at 10, 389 N.Y.S.2d at 876. Additionally, the court, taking judicial notice of the millions of recall letters already issued by car manufacturers, reasoned that if the letters were not admitted, the jurors "might well . . . believe that no such letters were issued and that the claimed defect was a solitary one and did not in fact exist." *Id.* at 11, 389 N.Y.S.2d at 877.

[257] The trial court's failure to properly charge the jury prompted the appellate division to order a new trial. The charge was prejudicial, the court held, because it was not made clear to the jurors that the letters were not admissions that the vehicle involved in the case was defective. *Id.*

[258] *See* Schwartz, *The Exclusionary Rule on Subsequent Repairs—A Rule in Need of Repair*, 7 THE FORUM 1 (1971) [hereinafter cited as Schwartz].

[259] *See, e.g.*, Comstock v. General Motors Corp., 358 Mich. 163, 99 N.W.2d 627 (1959); Fields v. Volkswagen of America, Inc., 555 P.2d 48 (Okla. 1976).

[260] Schwartz, *supra* note 258, at 6.

[261] *Id.* at 7.

[262] Apparently, other New York courts have reached the same conclusion as the *Barry* court. *See* Murphy v. General Motors Corp., 55 App. Div. 2d 486, 391 N.Y.S.2d 24 (3d Dep't 1977), wherein the appellate division observed, without comment, that the trial court had admitted a recall letter into evidence.

[263] See 2 P. ROHAN & R. RESKIN, COOPERATIVE HOUSING LAW AND PRACTICE § 2.02(5)(e)

leasehold interests which the purchaser acquires creates difficulties for those attempting to define the nature of the interest possessed by the tenant-stockholder.[264] Recently, in *Sebel v. Williams*,[265] the Civil Court, Queens County, held that the sale of cooperative stock involves the transfer of an interest in real property and that the real property statute of frauds[266] thus requires such a transaction to be in writing.[267]

In *Sebel*, defendants entered into an oral contract to purchase shares of stock in a housing cooperative and the accompanying proprietary lease which was allocated to that stock.[268] Defendants failed to purchase the stock, however, and plaintiffs instituted an action for breach of contract.[269] Contending that the cooperative stock and lease consistently have been held to be personal property,[270] plaintiffs asserted that the sale did not represent the exchange of an interest in real estate. Arguing, therefore, that the statute of frauds was not applicable to the sale, plaintiffs maintained that the oral agreement was enforceable notwithstanding the absence of a written contract.[271]

While agreeing with plaintiffs' argument that the stock and lease were personal property, the transfer of which did not constitute a sale of an interest in real estate, the *Sebel* court nevertheless

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(1977). Normally, in lieu of a fixed rental, a monthly service charge covering the tenant's proportionate share of the expenses of the cooperative is assessed. The amount of the assessment is usually based upon the percentage of shares owned by the cooperator. *See* Isaacs, *History and Development of the Co-operative Apartment*, PRAC. LAW, Nov. 1959, 62, 66.

[264] *See* Note, *Legal Characterization of the Individual's Interest in a Cooperative Apartment: Realty or Personalty?* 73 COLUM. L. REV. 250 (1973).

[265] 88 Misc. 2d 411, 388 N.Y.S.2d 494 (N.Y.C. Civ. Ct. Queens County 1976).

[266] N.Y. GEN. OBLIG. LAW § 5-703(2) (McKinney 1964 & Supp. 1976-1977) provides: "A contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest therein, is void unless the contract . . . is in writing . . . ."

[267] 88 Misc. 2d at 414, 388 N.Y.S.2d at 496.

[268] *Id.* at 411-12, 388 N.Y.S.2d at 494.

[269] *Id.* at 412, 388 N.Y.S.2d at 494.

[270] *Id.* at 413, 388 N.Y.S.2d at 495. In support of their contention that the sale of cooperative stock and the accompanying lease constituted the sale of personal property, plaintiffs cited Silverman v. Alcoa Plaza Assocs., 37 App. Div. 2d 166, 323 N.Y.S.2d 39 (1st Dep't 1971), and State Tax Comm'n v. Shor, 84 Misc. 2d 161, 378 N.Y.S.2d 222 (Sup. Ct. N.Y. County 1975), *aff'd per curiam*, 53 App. Div. 2d 814, 385 N.Y.S.2d 290 (1st Dep't 1976). In *Silverman*, the appellate division determined that cooperative stock qualifies as a "good," the sale of which is governed by article 2 of the Uniform Commercial Code. 37 App. Div. 2d at 172, 323 N.Y.S.2d at 45. Subsequently, in *Shor*, the Supreme Court, New York County, in the course of determining lien priorities, concluded that cooperative stock is personal property. 84 Misc. 2d at 164, 378 N.Y.S.2d at 224.

[271] 88 Misc. 2d at 413, 388 N.Y.S.2d at 495.

decided that the transaction was subject to the provisions of the statute of frauds.[272] The court pointed out that the statute of frauds covers the exchange of *interests* in real property,[273] which include some items that are "chattels real or personal property."[274] Thus, contracts involving personal property may be subject to the statute's provisions. Pursuant to this analysis, Judge Posner concluded that the statute indeed applies to the cooperative contract.[275]

The *Sebel* court, faced with a line of decisions apparently holding the sale of cooperative stock to be a sale of personal property,[276] engaged in a lengthy exercise to conclude that the sale nevertheless constituted the transfer of *"an interest"* in real property and was subject to the statute of frauds. Rather than struggle to characterize the cooperator's interest as an interest in real property, however, it is suggested that the better approach would be the one employed by the supreme court in *Frank v. Rubin,*[277] which is apparently the sole previous case to deal with the applicability of the statute of frauds to the sale of cooperative stock. In *Frank,* while the conclusion reached was essentially identical to that attained in *Sebel,* the decision was predicated upon the assumption that the purchaser's primary motivation was to obtain a lease.[278] Since the lease was for a period exceeding 1 year, the transaction was subject to the statute of frauds.[279] The *Frank* approach thus avoids the complex reasoning

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[272] *Id.*

[273] N.Y. GEN. OBLIG. LAW § 5-703(2) (McKinney 1964 & Supp. 1976-1977), *quoted in* note 266 *supra.*

[274] 88 Misc. 2d at 414, 388 N.Y.S.2d at 495. "As used in section 5-703 . . . the terms 'estate' and 'interest in real property' include every such estate and interest, freehold or *chattel,* legal or equitable, present or future, vested or contingent." N.Y. GEN. OBLIG. LAW § 5-101(2) (McKinney 1964) (emphasis added).

[275] 88 Misc. 2d at 414, 388 N.Y.S.2d at 496.

[276] *See* Susskind v. 1136 Tenants Corp., 43 Misc. 2d 588, 591, 251 N.Y.S.2d 321, 326 (N.Y.C. Civ. Ct. N.Y. County 1964); note 270 *supra.* It has been held that cooperative apartments constitute personalty for estate purposes and do not pass under a general devise of real property. *See In re* Turner's Estate, 36 Misc. 2d 684, 685, 233 N.Y.S.2d 108, 109 (Sur. Ct. N.Y. County 1962); *In re* Estate of Schlesinger, 22 Misc. 2d 810, 811-13, 194 N.Y.S.2d 710, 713-14 (Sur. Ct. N.Y. County 1959); *In re* Miller's Estate, 205 Misc. 770, 772, 130 N.Y.S.2d 295, 296 (Sur. Ct. N.Y. County 1954). For purposes of determining lien priorities, however, the courts have taken varying approaches. *Compare* State Tax Comm'n v. Shor, 84 Misc. 2d 161, 165, 378 N.Y.S.2d 222, 225 (Sup. Ct. N.Y. County 1975), *aff'd per curiam,* 53 App. Div. 2d 814, 385 N.Y.S.2d 290 (1st Dep't 1976) (for purposes of determining lien priorities, the cooperator's interest constitutes personal property), *with* Lacaille v. Feldman, 44 Misc. 2d 370, 386, 253 N.Y.S.2d 937, 954 (Sup. Ct. N.Y. County 1964) (proprietary lease is not personal property, but is in the nature of a quasi-real property interest).

[277] 59 Misc. 2d 796, 300 N.Y.S.2d 273 (Sup. Ct. N.Y. County 1969).

[278] *Id.* at 797, 300 N.Y.S.2d at 274.

[279] *Id.* A lessee's interest historically has been held to constitute personal property; today,

engaged in by the *Sebel* court; under the *Frank* rationale, the statute of frauds may govern the cooperative situation just as it controls ordinary leasehold interests.

Notwithstanding the court's questionable reasoning, it is suggested that the *Sebel* result is reasonable and desirable. Clearly, the cooperator possesses, at a minimum, the leasehold interest; in fact, the corporate form of organization enables the cooperator to exercise rights beyond those enjoyed by an ordinary lessee.[280] It would be anomalous, therefore, to conclude that a lessee for a period exceeding 1 year falls within the statute of frauds, while a cooperator exercising greater rights in an apartment is not subject to the statute's provisions. Thus, it is submitted that the *Sebel* court rendered a fair and proper decision.

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however, statutory developments have altered this basic principle. *See* 2 R. POWELL, LAW OF REAL PROPERTY § 221(2), at 187 (rev. ed. 1977). Thus the lease for a period exceeding 1 year has been treated as realty for statute of fraud purposes. *Id.*

[280] It has been stated that "while the owner of a cooperative apartment does not acquire a fee in the apartment, he does possess so many of the rights and obligations peculiar to fee ownership that the status is for all practical purposes indistinguishable." Silverman v. Alcoa Plaza Assocs., 37 App. Div. 2d 166, 173, 323 N.Y.S.2d 39, 46 (1st Dep't 1971) (Steuer and Eager, JJ., dissenting). Pursuant to I.R.C. § 216(a), the cooperator receives a tax benefit not enjoyed by an ordinary tenant. The amount of the cooperator's yearly payments which are attributable to the corporate debt incurred in acquiring and maintaining the land and building may be deducted from gross income. In addition, there are other benefits and rights unique to cooperative ownership. *See, e.g.*, Whitebook, *The Cooperative Apartment*, PRAC. LAW., April 1963, 25, 30-31.